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In the Supreme Court of the United States

OCTOBER TERM, 1963-4

INLAND EMPIRE BUILDERS, INC., J. C. BOESPFLUG CONSTRUCTION CO., and MCLAUGHLIN, INC., *Appellants,*

vs.

THE STATE OF WASHINGTON and WILLIAM S. SCHUMACHER, CLARK SQUIRE and A. E. HANKINS, as the TAX COMMISSION of the STATE OF WASHINGTON, *Appellees.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

JURISDICTIONAL STATEMENT

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

JURISDICTIONAL STATEMENT

INTRODUCTORY PARAGRAPH

Appellants appeal from the judgment of the Supreme Court of the State of Washington, which became final on September 26, 1963, affirming the judgment of the Superior Court of the State of Washington for Thurston County which held appellant contractors responsible and liable for the collection of sales tax on the price of military housing constructed under a contract between the appellant contractors and the United States pursuant to 42 U.S.C. Sec. 1594. This statement is submitted to show that the Supreme

Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the majority five judges and the opinion of the dissenting four judges of the Supreme Court of Washington is reported in 162 Wash. Dec. 609, — Wn.(2d) —, 384 P.(2d) 337. The Supreme Court opinion is attached hereto as Appendix A.

JURISDICTION

a. The appellant contractors commenced an action in the Superior Court of the State of Washington for Thurston County to enjoin the defendant State, acting through its Tax Commission, from collecting from appellants a money amount representing a consumer sales tax which appellants were allegedly obligated to collect on the contract price of their military housing construction contract, entered into by the Department of the Army and performed by appellants. The appellant contractors contended that the imposition of a liability for failure to collect the tax constituted an unconstitutional application of the state taxing statutes, Revised Code of Washington Title 82, under the United States Constitution.

b. The Superior Court decision denying appellant contractors relief and applying the taxing statute was entered July 3, 1961. The opinion of the Supreme Court of Washington affirming the trial court's decision, from which this appeal is taken, was entered August 1, 1963. Appellant's petition for re-hearing was denied on September 27, 1963, at which time the Supreme Court of

Washington's decision became final, and Notice of Appeal to this Court was served on December 18 and filed on December 20, 1963.

c. The jurisdiction of the Supreme Court of the United States to hear this appeal rests upon 28 U.S.C. Sec. 1257 (2).

4. The following cases, in which the above-entitled Court has accepted jurisdiction in a direct appeal under similar tax situations, are authority for accepting jurisdiction under a direct appeal in the present instance: *Esso Standard Oil v. Evans*, 345 U.S. 495, 97 L.ed. 1174; *Gwin, White & Prince v. Henneford*, 305 U.S. 434, 83 L.ed. 272; *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 98 L.ed. 546; *Railway Express Agency, Inc. v. Virginia*, 347 U.S. 359, 98 L.ed. 757, and *General Motors Corporation v. Washington*, Case No. 115, 1963 term of the United States Supreme Court.

STATUTES INVOLVED

a. The full text of the pertinent portions of Revised Code of Washington Sec. 82.04 and 82.08 are set forth in Appendix B. It is the application of the tax imposing portions of these statutes to the present transaction which is contended to be unconstitutional.

b. 69 Stat. 646; 42 U.S.C.A. Sec. 1594 *et seq.* This statute, known as the Capehart Act, constituted the statutory authority under which the United States through the Department of the Army entered into the construction contract involved in this case.

QUESTIONS PRESENTED

Is the application of the tax imposing provisions of the Washington Retail Sales Tax statute, which by its terms places the incidence of the tax on the purchaser, to the construction of Military Housing pursuant to a contract entered into between the appellant contractors and the United States, acting through the Department of the Army pursuant to authority of the Capehart Act (69 Stat. 646 *et seq.*, 42 U.S.C. Sec. 1594 *et seq.*), unconstitutional under the doctrine of sovereign immunity as imposing a tax on

a. the United States, or

b. an instrumentality of the United States entitled to equivalent immunity from state taxation?

STATEMENT OF THE CASE

Factual Background

The Capehart Act (69 Stat. 646 *et seq.*, 42 U.S.C. Sec. 1594 *et seq.*) created an authority whereby the various Military Departments of the United States could obtain the construction of military housing for service men by borrowing the funds from private lending institutions and repaying the loans over a 25-year period with funds obtained from annual appropriations. This program permitted the construction of a great deal more military housing through payment by the familiar installment plan than would have been possible if the construction could only be financed from funds currently available in each service's annual appropriations.

The housing as constructed became the property of and was fully under the control of the Military De-

partment involved, the construction was controlled and inspected in the same manner as other military construction jobs, the construction contract contained all of the standard provisions normally contained or required by law to be contained in a Federal procurement contract of such a nature, and the funds used to repay the loan came from military appropriations.

The savings and loan associations were deemed the principal source of the construction loans required. In order to comply with the loan security requirements imposed by the laws of various states on such associations, requiring principally an FHA secured mortgage, and in order to create the fiction of being a guarantor rather than a primary debtor as a device to avoid including the borrowed amounts in the national debt limitations and annual expenditure authorizations, the United States required that dummy corporations be created (Opinion of the Attorney General of the United States dated October 22, 1959; Tr. 0068, p. A-1).

These dummy corporations performed the function of signing a note to the lending institution secured by a mortgage on a nominal leasehold without right of possession, the repayment of which was unconditionally promised by the United States, and further of being a nominal signator to a construction contract also executed by the United States and the building contractor. The stock of the corporations was at all times during and after construction in the actual or constructive ownership of the United States, and particularly

when the construction loan advances allegedly subject to tax were made to the appellant contractors.

The United States had at a time previous to the creation of the dummy corporations already entered into a contract with the building contractor by written acceptance of the builders' bonded bid for performance of construction of the military housing involved.

In 1959 the appellant contractors entered into and performed such a contract with the United States Department of Army for the construction of approximately 850 units of military housing on the Fort Lewis Military Reservation at Tacoma, Washington (Tr. 0005, 0006). Appellants did not collect the sales tax on the price of the construction (Tr. 0010 F).

The Washington Retail Sales Tax Act imposes the liability and incidence of the Retail Sales Tax on the purchaser or buyer (RCW 82.08.050, App. B. p. 7), but makes the seller responsible for collection of the tax and separately liable if he fails to collect it (RCW Sec. 82.08.050, App. B. p. 7).

The Tax Commission of the State of Washington, appellees herein, applied the Washington Sales Tax statute to the appellants' construction of the Fort Lewis Military Housing and assessed a tax of $560,495.44 against these contractors.

How the Federal Question Was Presented

The appellant contractors brought suit against the Tax Commission to resist the application of the Washington Retail Sales Tax statute to them. In a pre-trial order in the Superior Court of Thurston County, Washington, which replaced the pleadings (Tr. 0002-

0016) the plaintiff contractors contended in paragraph 3 that the sale was immune from the state sales tax because it was a sale to the United States, in paragraph 4 that the Retail Sales Tax Act could not be applied to a sale to an instrumentality of the United States, and in paragraph 6 that the application of the tax act to the transaction involved was in violation of the United States Constitution (Tr. 0015).

The constitutionality under the United States Constitution of imposing the tax was one of the issues of law specified in the pre-trial order (Tr. 0016).

The trial court ruled adversely to plaintiff's contentions on the constitutional issue by concluding as a matter of law that the sale was to the corporations, not to the United States (Tr. 0037), and that the corporations were not exempt instrumentalities (Tr. 0036). The trial court further rejected the plaintiff's proposed conclusions of law to the contrary contained in paragraphs III, IV and V (Tr. 0055, 0056).

On appeal, virtually the entire argument related to (1) whether the United States was the buyer and therefore constitutionally exempt from the tax and (2) whether dummy corporations were instrumentalities of the United States and therefore constitutionally exempt. As stated in the five-Judge majority opinion (App. Ap.4):

> "The facts upon which these appeals are predicated are not in dispute. The legal issue involved is whether the transactions, pursuant to which the military housing was constructed, are shielded from state taxation by the sovereign immunity

> granted to the United States government by the federal and state constituions."

The issue is further considered by the four-Judge dissent at App. A, p. 17:

> "It is my disagreement with the majority in the disposition of the issue relating to whether the mortgagor-builder corporation is an instrumentality of the United States that brings me to a result contrary to that of the majority in this case."

THE QUESTIONS ARE SUBSTANTIAL

This case involves an asserted tax liability of $560,495.44 against appellant contractors, and when combined with the companion cases on appeal of *Ian Murray, et al. v. Washington* and *Hebb & Narodick v. Washington* (Supreme Court of Washington docket numbers 36226, 36228 and 36229, respectively) a total potential liability of over one million dollars is at issue.

The majority opinion of the Washington Supreme Court is, in the important constitutional aspects here involved, not only in conflict with the opinions of the Florida Supreme Court in *Green v. Eglin AFB Housing, Inc.*, Fla. (1958), 104 So.(2d) 463, and of the Michigan Supreme Court in *Knapp-Stiles v. Michigan Department of Revenue* (1963) 370 Michigan 629, 122 N.W.(2d) 642, but is in direct conflict with and does not even attempt to distinguish the most recent related decision of the United States Supreme Court on federal instrumentality as contained in its affirmance of *United States v. Livingston* (E.D., S.Ct.) 179 F.Supp. 9; aff'd 364 U.S. 281, 4 L.ed.(2d) 1719; pet. reh. denied 364

U.S. 855, 5 L.ed.(2d) 79, 81 S.Ct. 35. The genuineness of this conflict is established by the existence of a four-judge dissent to the Washington decision being appealed, which dissent is based on a view consistent with, *inter alia*, the foregoing cited cases (App. A, p. 17).

The decision of the Supreme Court of Washington tends to complicate and render uncertain the utilization of the Capehart method of financing and to subject projects utilizing such method to state taxation from which they are or ought to be otherwise constitutionally immune.

However, notwithstanding the substantial importance of each of the foregoing considerations, by far the most significant and far-reaching issue, and one involving a fundamental and heretofore universally accepted constitutional doctrine, is whether the concept of sovereign immunity of instrumentalities of the United States, as set forth in *McCulloch v. Maryland*, 4 Wheat. 316, 4 L.ed. 579, 17 U.S. 159; *Clallam County (Wash.) v. United States* (1923) 263 U.S. 341, 68 L.ed. 328, 44 S.Ct. 121, reiterated in *Kern-Limerick, Inc. v. Scurlock* (1954) 347 U.S. 110, 98 L.ed. 546, 74 S.Ct. 403, and recently confirmed in *United States v. Livingston* (E.D., S.Ct.) 179 F.Supp. 9; aff'd 364 U.S. 281, 4 L.ed. (2d) 1719; pet. reh. denied 364 U.S. 855, 5 L.ed.(2d) 79, 81 S.Ct. 35, will continue to exist.

Stated differently, and in the factual context of the present case, if a corporation formed for the United States which executes a note, mortgage and contract at the direction of and to serve the exclusive purpose

of the United States, which immediately after such function serves no other purpose, has no assets nor any possibility of acquiring assets or earning a profit and which is actually or constructively owned at all material times by the United States—if such a corporation is not an instrumentality of the United States, it is difficult to conceive any entity which could be such an instrumentality. If no entity can qualify as a federal instrumentality, the sovereign immunity concept of such an instrumentality as set forth in the foregoing cases will atrophy and disappear, whether specifically rejected or not.

The five-Judge majority of the Washington Supreme Court has as a practical matter rejected the doctrine of sovereign immunity of instrumentalities of the United States, and if that decision is permitted to stand by this Court, it will be hereafter universally cited to support such rejection. The substantial question of universal interest throughout the jurisdiction of the United States then becomes whether such a precedent should be accepted or reversed.

An immediate reaction may be that the foregoing contention of significance is exaggerated but we believe it can be demonstrated that such is not the case.

Practical limitations on the Jurisdictional Statement do not permit a detailed analysis of the virtually undisputed evidence contained in the admissions of fact in the pre-trial order, the twenty-five exhibits and the oral testimony at trial, to establish the uniquely singular purpose and function of the Capehart Corporation as an agent or instrumentality of the United States.

However, the substantiality of such evidence is established not only by the representations contained in the Statement of the Case herein, but by the characterizations and conclusions relating to these corporations contained in the following opinions:

(a) *Green v. Eglin AFB Housing, Inc.* (1958) 104 So.(2d) 463:

> [2] "Even if we regard the AFB corporation as private enterprises, their interest in the property is so negligible — lessees without right of use or possession — as to make it entirely unrealistic to hold that it destroys the status of these buildings as a part of the public works of the United States.
>
> "It is very doubtful if these corporations should be regarded as anything other than agencies or instrumentalities of the Federal Government. In *Clallam County, Wash. v. United States* [263] U.S. [341], [44 S.Ct. 121], 68 L.Ed. 328, the Supreme Court held that a corporation created for the purpose of operating a sawmill and railroad in the promotion of the war effort during the first World War and which was wholly owned by the United States was an agency of the United States and that its property was, therefore, immune from state taxation. In describing the corporation there involved the [*sic*] used language peculiarly applicable to each AFB corporation: 'The incorporation and formal erection of a new personality was only for the convenience of the United States, to carry out its ends.' The creation of the AFB corporations was only for the convenience of the United States to enable it to finance military construction in a manner determined by the Congress to be most conducive to the national interest."

(b) *Knapp-Stiles, Inc. v. Michigan Department of Revenue* (1963) 370 Mich. 629, 122 N.W.(2d) 642:

> "In the instant case, as distinguished from *Offcutt* and *Dayton*, the lessee corporation got nothing, its leasehold interest was worth nothing to it or its stockholders, and the only ones receiving any benefits from the contractual arrangements were the department for whom the housing was built, plaintiff who presumably made some profit from building the same, and the mortgagees who apparently received interest on their loans. Nothing in that entire situation relieves the stark fact that the corporation was but a sham."

(c) Minority opinion in the present case at Appendix A, page 24:

> "In the instant case we should hold that, although the mortgagor-builder is the "buyer" to whom the retail sale of the housing project construction was made, it was nothing more than an instrumentality of the United States government; that it had no commercial purpose other than for the convenience of the United States, serving as a means to the end of obtaining this military housing; and that the sovereign immunity of the federal government applies."

The majority opinion below seeks to distinguish the above cases on the ground (App. A, p. 13):

> "In the *Green* and *Knapp-Stiles* cases, the result was determined by interpreting a state exemption statute much broader than our own, for which reason the cases are distinguishable."

This distinction is not valid. It is true that the Michigan and Florida Sales Tax Statutes have exemption provisions differing from the provision in the Wash-

ington statute, but it is also true that the Michigan and Florida tax statutes place the incidence of the tax on the *seller*. In both of these states the tax could be applied on the seller in a direct sale to the United States, but for the exemption provision of the statute. It is not now and has never been argued in this case that economic impact on the United States earned entitlement to constitutional immunity (*Alabama v. King & Boozer* (1941) 314 U.S. 1, 86 L.ed. 3, 62 S.Ct. 43, and *James v. Dravo Construction Company*, 302 U.S. 134, 82 L.ed. 155), and it is understood that under the present law, any seller may be taxed on sales to the United States.

By imposing the sales tax on the seller, the states of Florida and Michigan would have subjected the United States to the economic burden of the tax from which the United States was constitutionally immune in states such as Washington which places the incidence of the tax on the *purchaser*.

Without the express exemption extended to the United States by statutes in states such as Florida and Michigan, such states would probably see precious little Federal construction spending because of the unfavorable tax situation. Therefore, the exemption was enacted to furnish in such states protection to the United States equivalent to the constitutional immunity it enjoys elsewhere. It may be that the exemptions are not identical in scope with the constitutional immunity, but it will be seen that any deviations do not materially alter the basic identity of the central issue decided; that the sales are to the United States through an agency, or to a United States instrumentality.

The only similar tax case relating to Capehart construction and the issues here involved is *Silverblatt, Inc. v. New York*, 5 N.Y.(2d) 635, 159 N.E.(2d) 195, cert. den. 361 U.S. 912. The soundness of this opinion has been seriously questioned as follows in the minority opinion below (App. A, p. 22):

> "An analysis of *In re S. S. Silberblatt, Inc. v. Tax Comm. of the State of New York*, 5 N.Y.(2d) 635, 159 N.E.(2d) 195, 186 N.Y.S.(2d) 646 (1959), cited by the majority, discloses that the opinion is based on the erroneous premise that the Delaware corporations were '... created for a commercial purpose for private profit, as distinguished from a governmental purpose.' As heretofore stated, consideration of the housing contract in its entirety cannot support such a conclusion. The analysis of the housing contract and the reasoning of the dissent in the *Silberblatt* case is correct."

Finally, one of the most significant conflicts in the Washington Supreme Court opinion and the one with possibly the broadest impact is the court's disregard of *United States v. Livingston* (E.D., S.Ct.) 179 F. Supp. 9; aff'd 364 U.S. 281, 4 L.ed.(2d) 1719; pet. reh. denied 364 U.S. 855, 5 L.ed. 79, 81 S.Ct. 35, and its reliance upon its own earlier decision in *DuPont v. State of Washington* (1954), 44 Wn.(2d) 339, 267 P.(2d) 91.

The facts of the two cases are virtually identical, each involving the management by DuPont for one dollar per year of an atomic production facility for the United States. If anything, the *Livingston* case is more similar to the present case because it involved application of a sales tax statute whereas *DuPont* involved application of a business and occupation tax

on DuPont's total expenditures at the Hanford, Washington Atomic Project.

Both cases were primarily decided on whether DuPont was such an agent or instrumentality of the United States that its activities were entitled to sovereign immunity. The Washington Supreme Court held that it was not, and cited its decision in support of the majority opinion in the present case. The three-judge Federal Court in the *Livingston* case held that DuPont was such an agent in operating the Savana River Atomic Project, and that its purchases were immune from taxation by the State of South Carolina. This decision was affirmed upon motion by this Court.

We submit that the decision of *DuPont v. Washington* is irreconcilable with and superseded by the decision in *United States v. Livingston*, and that the failure of the Washington Supreme Court to consider this conflict, although it was vigorously urged in both appellants' opening (Tr. 0068) and reply briefs (Tr. 0073), creates a conflict and uncertainty in the area of sovereign immunity that only the opinion of this Court, after full, plenary presentation, can resolve.

It is therefore urged that the present appeal involves several aspects of an important constitutional question of general concern, and should be granted a full hearing on briefs and oral argument.

Respectfully submitted,

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APPENDICES A AND B

Appendix A—Opinion of the Supreme Court of the State of Washington App. A, pages 3 to 24

Appendix B—Statutes Involved App. B, pages 1 to 13

APPENDIX A

OPINION OF THE SUPREME COURT OF THE STATE OF WASHINGTON

[Nos. 36226, 36227, 36228, 36229. En Banc. August 1, 1963]

IAN MURRAY *et al.*, *Appellants*, v. THE STATE OF WASHINGTON *et al.*, *Respondents*.

INLAND EMPIRE BUILDERS, INC., *et al.*, *Appellants*, v. THE STATE OF WASHINGTON *et al.*, *Respondents*.

HEBB & NARODICK CONSTRUCTION CO., INC., *et al.*, *Appellants*, v. THE STATE OF WASHINGTON *et al.*, *Respondents*.

HEBB & NARODICK CONSTRUCTION CO., INC., *Appellant*, v. THE STATE OF WASHINGTON *et al.*, *Respondents*.*

Consolidated appeals from judgments of the Superior Court for Thurston County, Nos. 32176, 32186, 32195, 32196, Charles T. Wright, J., entered July 3, 1961. *Affirmed*.

Consolidated actions to recover taxes paid under protest. Plaintiffs appeal from judgments in favor of the defendant.

Bogle, Bogle & Gates, Edward G. Dobrin, and *Richard S. Sprague*, for appellants Murray *et al.*

Allen, DeGarmo & Leedy and *Seth W. Morrison*, for appellants Inland Empire Builders, Inc., *et al.*

Casey & Pruzan, by *Carl Pruzan*, for appellants Hebb & Narodick Construction Co., Inc., *et al.*

The Attorney General, John W. Riley, Chief Assistant, and *Timothy R. Malone, Assistant*, for respondents.

OTT, C. J.—This appeal is a consolidation of four actions brought by several contractors to recover a retail sales tax paid under protest, and to enjoin the State Tax Commission from assessing the sales tax in connection with the construction of Capehart Act housing at military installations in Washington.

From adverse judgments, the contractors appeal.

The facts upon which these appeals are predicated are not in dispute. The legal issue involved is whether the transactions, pursuant to which the military housing was constructed, are shielded from state taxation by the sovereign immunity granted to the United States government by the federal and state constitutions.

Each of the appellants was awarded contracts under the provisions of the Capehart Act (69 Stat. 651-654 as amended). Since the contract provisions are identical, we will refer only to the material portions of the documents in cause No. 36226. The procedure for the execution of a contract under the act, in so far as here material, may be stated as follows:

The Secretary of Defense, after determining a need for military housing, issues an invitation for bids. The contractor submitting the lowest acceptable bid receives a "Letter of Acceptability" from the Secretary. The letter requires the successful bidder to establish a private "mortgagor-builder" corporation under the laws of the state of Delaware, and to qualify it to do business in the state involved. The contractor furnishes the corporation with $1,000 for capital stock, purchases all of it, and elects its officers and directors. The United States government executes to the corporation a 55-

year lease of the real estate upon which the housing is to be constructed. The corporation is to obtain private financing by giving a mortgage on its leasehold, and obtain a commitment from the Federal Housing Administration to insure its mortgage loan. The mortgage loan in is the amount of the contractor's bid.

The "Letter of Acceptability" prescribes the "initial closing" procedure, which entails the execution of the following documents:

(1) The 55-year lease between the United States and the corporation for a consideration of $1,000, paid by the corporation to the United States government. The corporation agrees, during the period of construction, to maintain insurance and to save the United States government harmless from many laws, ordinances, and regulations applicable to the leased premises, with regard to construction, sanitation, licenses or permits to do business.

(2) The corporation executes a note, secured by a real and chattel mortgage on its real-estate leasehold, to the private lender.

(3) The corporation, contractor, and the United States execute a housing contract which provides that all construction is to be inspected and supervised by the United States; that progress payments are to be made by the corporation from the mortgage loan, upon request of the contractor and approval of the United States, and that, upon full payment, title to the housing units vests in the United States, subject to contractor liability for latent defects. The contract further provides that the contractor shall act as agent for the cor-

poration, guarantee its performance, and furnish a performance bond to the corporation and the mortgagee.

(4) An irrevocable escrow agreement is executed which provides that the resignations of the officers and directors of the corporation, and the stock certificates of the corporation, endorsed in blank, are to be placed in escrow, with instructions to the escrow holder to deliver these documents to the United States upon completion and acceptance of the project.

(5) The United States executes a written guarantee to pay the mortgage installment payments to the private mortgagee and or the Federal Housing Administration, the insurer.

The provisions of the Capehart Act were fully complied with by the contractors involved in these appeals.

Appellants' assignments of error ra two principal issues: First, the appellant contractors contend that, under Washington law, the consumer of the housing project is the party liable for payment of the sales tax, and that, as a result of the statutory method for the construction of Capehart housing, the United States is the consumer and, therefore, its constitutional immunity from state taxation applies. Secondly, appellants contend that the mortgagor-builder corporation is an agency of the United States and, as such, is immune from state tax.

[1] The function of interpreting state statutes to determine who is liable for payment of a sales tax is reserved to the state courts involved. *Alabama v. King & Boozer*, 314 U.S. 1, 86 L.Ed. 3, 62 S.Ct. 43, 140 A.L.R.

615 (1941); *Kern-Limerick, Inc., v. Scurlock*, 347 U.S. 110, 98 L.Ed. 546, 74 S.Ct. 403 (1954).

RCW 82.08.020 provides that " . . . there shall be collected a tax on each retail sale in this state . . . " A retail sale is defined in RCW 82.04.050 as including

" . . . the sale of or charge made for tangible personal property consumed and or for labor and services rendered in respect to the following: . . . (b) the constructing . . . of new or existing buildings or other structures under, upon, or above real property *of or for consumers*, . . . " (Italics ours.)

A consumer is defined in RCW 82.04.190(4) as "Any person who is an *owner, lessee or has the right of possession* to or an easement in real or personal property . . . " (Italics ours.)

RCW 82.08.050 provides in part:

"The tax hereby imposed shall be paid by the *buyer* to the seller, and each *seller* shall collect from the *buyer* the full amount of the tax payable in respect to each taxable sale . . .

"In case any seller fails to collect the tax herein imposed . . . he shall . . . be personally liable to the state for the amount of the tax." (Italics ours.)

Appellants concede that a retail sale, as defined in RCW 82.04.050, did occur, but contend that the consumer defined in RCW 82.04.190, and the buyer denominated in RCW 82.08.050 are synonymous, and that the United States government is the consumer and taxable party because it becomes the owner of the housing units upon their completion and acceptance.

[2] With this contention, we do not agree. One of the purposes of RCW 82.04.050 is to define the event that gives rise to a taxable transaction, which is the rendition of labor and services in the construction of new buildings upon real property of or for consumers. RCW 82.04.190 establishes the means by which the consumer is identified. These sections do not designate the party liable for payment of the tax in any given transaction. RCW 82.08.050 provides that the retail sales tax shall be borne by the buyer, who is primarily liable for payment of the tax. *Kaeser v. Everett*, 47 Wn.(2d) 666, 289 P.(2d) 343 (1955).

We must therefore determine who is the buyer under the facts of the instant case. In this regard, appellants contend that the United States is the buyer because it bears the economic burden of paying for the military housing, by virtue of its guarantee of the mortgage obligation.

In *Alabama v. King & Boozer, supra*, the state of Alabama, pursuant to a statute which imposed the sales tax upon the purchaser, levied a sales tax upon the sale of lumber to a contractor who was constructing installations for the Army. It was there contended that the sales tax could not be collected from the contractor for the reason that the United States was the purchaser, within the meaning of the Alabama statute. In answering this contention, the Supreme Court of the United States held:

" . . . The taxing statute, as the Alabama courts have held, makes the 'purchaser' liable for the tax to the seller, who is required 'to add to the sales price' the

amount of the tax and collect it when the sales price is collected, whether the sale is for cash or on credit. Who, in any particular transaction like the present, is a 'purchaser' within the meaning of the statute, is a question of state law on which only the Supreme Court of Alabama can speak with final authority. ***But it seems plain, as the Government concedes and as we assume for present purposes, that under the provisions of the statute the purchaser of tangible goods who is subjected to the tax measured by the sales price, is the person who orders and pays for them when the sale is for cash or who is legally obligated to pay for them if the sale is on credit*** . . ." (Italics ours.)

The court concluded:

"We cannot say that the contractors were not, or that the Government was, bound to pay the purchase price, or that the contractors were not the purchasers on whom the statute laye the tax. The added circumstance that they were bound by their contract to furnish the purchased material to the Government and entitled to be reimbursed by it for the cost, including the tax, no more results in an infringement of the Government immunity than did the tax laid upon the contractor's gross receipts from the Government in *James v. Dravo Contracting Co., supra* [302 U.S. 134]."

[3, 4] Applying this rule, the buyer is the person who is *legally obligated* to pay the seller in any transaction. The housing contract executed by the parties provided that "The mortgagor-builder [corporation] shall pay the eligible-builder [contractor] for the performance of this Housing Contract, and all other obligations of

the eligible builder herein, . . . " By the express terms of the contract, the corporation, and not the United States, was obligated to pay the appellant contractors; hence, the corporation was the buyer under the statute. Under the provisions of the Capehart Act and the facts in the instant case, the United States government was not obligated to pay the seller. The fact that the ultimate economic burden of the tax may fall upon the United States does not vitiate a state tax on the transactions. *Alabama v. King & Boozer, supra; Kern-Limerick, Inc., v. Scurlock, supra; United States v. Detroit*, 355 U.S. 466, 2 L.Ed.(2d) 424, 78 S.Ct. 474 (1958); *E. I. Du Pont de Nemours & Co. v. State*, 44 Wn.(2d) 339, 267 P.(2d) 667 (1954).

Our conclusion in this regard is also supported by the following cases:

United States v. Harrison & Grimshaw Constr. Co., 305 F.(2d) 363 (1962), involved the question of whether the provisions of the Miller Act applied to the performance bond given by the eligible builder under a Capehart Act contract. The court held (p. 368):

" . . The projects are of a private nature until completition and assumption of control by the government. *The mortgagor-builder has a contract with a construction company to build the project. The constructor looks to the mortgagor-builder for payment for his work and owes to the mortgagor-builder the obligation to perform. . . .* " (Italics ours.)

In *In re S. S. Silberblatt, Inc., v. Tax Comm. of the State of New York*, 5 N.Y.(2d) 635, 159 N.E.(2d) 195, 186 N.Y.S.(2d) 646 (1959), it was said:

"Likewise, we must reject appellant's contention that the subject mortgages, as direct obligations to the United States, are immune from State or local taxation, as provided in section 3701 of the Revised Statutes of the United States (U. S. Code, tit. 31, § 742) which exempts 'Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States' since they are not 'of the same type as those specifically enumerated' in the statute (*Smith v. Davis*, 323 U.S. 111, 117). Under the arrangement authorized by the Enabling Act, it is clear that the device employed was designed to relieve the Government of its financially burdensome obligation to provide housing for its military personnel and at the same time avoid increasing the national debt. It did not pledge its credit in the usual sense, but merely guaranteed each 'periodic payment' based on a monthly average of $90 per family unit."

Congress, in its discretion, by enacting the Capehart law, chose to leave the hazards of construction, the purchasing of proper materials, and the furnishing of proper labor performance to private contractors and private lenders. It chose to guarantee only the payment to the private lender, after units acceptable to the government were erected upon the leased premises. We conclude, therefore, that the mortgagor-builder corporation was the party legally obligated to pay the contractor, and that it was the buyer denominated in RCW 82.08.050.

Is the mortgagor-builder corporation an agency of the United States?

Appellants contend that title to the units, when built in accordance with the contracts, vested in the United States; that the United States controlled and dictated the terms of the construction contracts, and that it guaranteed the mortgage obligation and ultimately gained ownership of all of the corporation's capital stock; hence, the corporation is a government agency.

In support of this contention, appellants rely on *Clallam County v. United States*, 263 U.S. 341, 68 L.Ed. 328, 44 S.Ct. 121 (1923); *Green v. Eglin AFB Housing, Inc.*, 104 So.(2d) 463 (Fla. 1958); and *Knapp-Stiles, Inc., v. Michigan Department of Revenue*, CCH 2 Mich. Tax Cases ¶ 200-202 (1962).

The *Clallam County* case held that a corporation, organized pursuant to a World War I emergency act which authorized the Director of Aircraft Production to establish one or more state corporations to produce war materials, was an agency of the United States and, as such, its activities were exempt from state taxation. The case is not apropos. The Director of Aircraft Production was, by law, an agent of the government. In the instant case, the successful bidders were not authorized agents of the government. Furthermore, the facts in the cited case did not disclose any evidence of an intent to distinguish the corporate activities from those of the United States. In this regard, the court stated (p. 345): " . . . This is not like the case of a corporation having its own purposes as well as those of the United States . . . "

In the *Green* case, the court stated (p. 467):

" . . . The question here is the extent of an *exemp-*

tion granted by *state statute*. Had the legislature intended to limit the exemption to that required by the Federal Constitution there would have been no occasion whatever to go further than to say "There shall also be exempted all sales made to the United States." But the legislature intended to grant a greater exemption and made that intent clear . . . ' "

In *Knapp-Stiles, Inc., v. Michigan Department of Revenue, supra*, the court stated:

"At the outset, it may be noted that the question is *not* whether the State has the *power* to impose such tax upon contractors who are performing contracts with the United States.

" . . .

"Michigan has the power to impose such a tax. Has it done so? Or has it, by the language of the statute, exempted the sales here involved from the tax? . . . "

In the *Green* and *Knapp-Stiles* cases, the result was determined by interpreting a state exemption statute much broader than our own, for which reason the cases are distinguishable.

[5] The mortgagor-builder corporate entity created for the purpose of constructing and financing Capehart housing serves a separate and distinct function from that of the United States. That such a corporation is not an agency of the United States is sustained by the following decisions:

In *In re S. S. Silberblatt, Inc., v. Tax Commission of the State of New York, supra*, the New York Court of Appeals held that the mortgagor-builder corporation

was subject to that state's mortgage recording tax, stating (p. 641):

"The appellant's contention that this petitioner and the five corporate mortgagors are instrumentalities of the Federal Government or its agencies and, as such, are exempt from State and local taxation, is without substance. . . . At the time of the execution, delivery and recording of these mortgages, each of the mortgagors was a private corporation, all of the capital stock of which was privately owned. They were created for a commercial purpose for private profit, as distinguished from a governmental purpose. In the absence of statute to the contrary, it may not be assumed that a governmental function was involved. They possess all of the requisites and responsibilities of corporate existence and, as such, *are an entity separate and apart from the United States* (*United States v. Strang*, 254 U.S. 491) *and this is so, notwithstanding the fact that all of the capital stock of each corporation will ultimately be owned by the Federal Government* (*Sloan Shipyards v. United States Fleet Corp.*, 258 U.S. 549, 42 S.Ct. 386, 66 L.Ed. 762) . . ." (Italics ours)

In *United States v. Ft. George G. Meade Defense Housing Corp. No. 1*, D.C., 186 F.Supp. 639 (1960), it was held that the leasehold interest acquired by the mortgagor-builder corporation from the United States was subject to the Maryland mechanics' lien law because

" . . . the so-called Capehart Act contemplates leaving the entire arrangement for the financing and construction of Capehart housing projects in the hands of

private enterprise until the point at which the government has secured the capital stock of the Housing Corporation . . . "

The reasoning in the following cases, although not arising from Capehart transactions, supports the view that the mortgagor-builder corporations are not agencies of the government.

In *E. I. Du Pont de Nemours & Co. v. State*, 44 Wn. (2d) 339, 267 P.(2d) 667 (1954), it was contended that the Du Pont Company was an agent or instrumentality of the United States in its operation of the Hanford Engineer Works. We held (pp. 349, 350):

" . . . the fact that the government reserved and exercised the right to restrict or control the action of the contractor as to its general activities does not establish the existence of an agency relationship. . . .

" . . .

"It is also without significance that all of the real and personal property utilized in performing the contract was owned by the government. [Citing cases.] The same is true with regard to the fact that the government exerted unusual supervisory controls over every phase of the contractor's activity. [Citing case.]"

In *United States v. Brown*, D.C., 41 F.Supp. 838 (1941), the contention was rejected that certain Regional Agricultural Credit Corporations, created pursuant to federal enactment, were immune from state taxation because the United States owned all of the capital stock of the corporations. The court said (p. 840):

"Whether or not these Regional Corporations shall enjoy sovereign immunity from taxation is wholly a

question of Congressional intent. They are purely commercial corporations exercising no sovereign function. In the absence of statutory provision, there is no reason why they should be exempted from taxation, especially in view of Congressional policy concerning this type of corporation, evidenced by many statutory provisions expressly subjecting the real property of similar corporations to taxation.

"The mere fact that the United States owns all the capital stock of these corporations is not alone sufficient to endow them with sovereign immunity, nor do they acquire such immunity merely because they are the medium through which the Government carries out certain proprietary activities. Note, 83 L.Ed. 799 et seq.

" . . .

"When a corporation is created for commercial as distinguished from Governmental purposes, it is ordinarily implied in the absence of statutory provisions to the contrary, that such corporation shall have all the requisites and responsibilities of corporate existence, even though the United States owns all the stock. Such a corporation is an entity separate from the United States. *United States v. Strang*, 254 U.S. 491, 41 S.Ct. 165, 65 L.Ed. 368."

We conclude that the mortgagor-builder corporation, having served an independent and distinct purpose in the taxable event, is not a federal agency.

Further, Congress has not expressed a legislative intent to immunize a Capehart corporation from state taxation. The invitations to bid expressly provided:

"Nothing in this Invitation for Bids shall be deemed

to relieve the eligible builder of any liability for the payment of sales or use taxes properly levied."

For the reasons stated, the sales tax was "properly levied" upon these transactions. Appellants, under the statute, were obligated to collect the tax from the mortgagor-builder corporations. Having failed to collect it, appellants are liable for the tax. RCW 82.08.050, *supra*.

The judgments are affirmed.

FINLEY, ROSELLINI, HAMILTON, and HALE, JJ., concur.

HUNTER, J. (dissenting)—The majority say that the sales tax must fall upon the person legally obligated to pay for construction of the military housing. With this I agree.

The majority then state that, by the express terms of the contract with the mortgagor-builder, the Delaware corporation, and not the United States was legally obligated to pay the appellant contractors; hence, the corporation was the buyer under the statute. The fact that the ultimate economic burden of the tax may fall upon the United States does not constitute it as the person legally obligated to pay the tax. Neither do I disagree with this rationale.

It is my disagreement with the majority in the disposition of the issue relating to whether the mortgagor-builder corporation is an instrumentality of the United States that bring me to a result contrary to that of the majority in this case.

Under the established rule for the construction of contracts, a contract must be picked up by its four

corners and considered in its entirety. In so doing, it is inescapable to conclude other than that the prime purpose of the housing contract was the construction of military housing for the exclusive use of the United States. It was necessarily the obligation of the government to pay for this housing and, although it did not wish to be directly obligated, the United States, in causing the Delaware corporation to be organized, did so to provide a means to carry out its obligation to compensate the contractors for the construction of this housing.

In *Clallam County v. United States*, 263 U.S. 341, 68 L.Ed. 328, 44 S.Ct. 121 (1923), it was held that a corporation created for the purpose of operating a sawmill and railroad for the promotion of the war-effort and wholly owned by the United States was an instrumentality of the United States. The court there said:

"In short the Spruce Production Corporation was organized by the United States an an instrumentality for carrying on the war, all its property was conveyed to it by or bought with money coming from the United States and *was used by it solely as means to that end*, and when the war was over it stopped its work except so far as it found it necessary to go on in order to wind up its affairs. . . .

" . . .

"The State claims the right to tax on the ground that taxation of the agency may be taxation of the means employed by the government and invalid upon admitted grounds, but that taxation of the property of the agent is not taxation of the means. We agree that it

'is not always, or generally, taxation of the means,' as said by Chief Justice Chase in *Thomson v. Pacific Railroad*, 9 Wall 579, 591. But it may be, and in our opinion clearly is when as here not only the agent was created but all the agent's property was acquired and used, for the sole purpose of producing a weapon for the war. *This is not like the case of a corporation having its own purposes as well as those of the United States and interested in profit on its own account. The incorporation and formal erection of a new personality was only for the convenience of the United States to carry out its ends. . . .* " (Italics mine.)

Contemporaneous with the signing of the housing contract, the stock of the corporation in the instant case was irrevocably placed in escrow, together with the resignation of the officers and directors, to be delivered to the United States at the conclusion of the construction of the housing. There was no possible contingency for the return of the stock to the stockholders or the documents of resignation to the officers and directors. The corporation owned nothing of any value in the housing being constructed. It served solely as a means to the end of obtaining military housing for the United States. There was no possibility for it to engage in any purpose other than to serve the end of obtaining military housing for the United States on this exclusive project. Because it had no purposes independent of those of the United States, the corporation was nothing more than an instrumentality thereof.

The appellants cite *Green v. Eglin AFB Housing, Inc.*, 104 So.(2d) 463 (Fla. 1958), which is persuasive

of their contention. There, under the authority of the Capehart Act, the government entered into a contract virtually identical with that of the instant case for the construction of military housing at the Eglin Air Force Base in Florida. The Florida court in effect found that the Delaware corporations were government instrumentalities, stating:

" 'The AFB corporations were created at the direction of the United States for the sole purpose of borrowing money to be expended in constructing facilities needed by the United States, to be repaid by the United States and further securing the payment of this money by a mortgage upon property of the United States. These corporations will continue in existence until the mortgage debts are paid, so as to provide a party against whom the mortgages may be foreclosed in the remote contingency that the United States defaults in its obligation to pay the mortgage debt.

" 'Even if we regard the AFB corporation as private enterprises, their interest in the property is so neglible —lessees without right of use or possession—as to make it entirely unrealistic to hold that it destroys the status of these buildings as a part of the public works of the United States.

" 'It is very doubtful if these corporations should be regarded as anything other than agencies or instrumentalities of the Federal Government. In *Clallam County, Wash. v. United States*, 263 U.S. 341, 44 S.Ct. 121, 68 L.Ed. 328, the Supreme Court held that a corporation created for the purpose of operating a sawmill and railroad in the promotion of the war ef-

fort during the first World War and which was wholly owned by the United States was an agency of the United States and that its property was, therefore, immune from state taxation. In describing the corporation there involved the [sic] used language peculiarly applicable to each AFB corporation: "The incorporation and formal erection of a new personality was only for the convenience of the United States, to carry out its ends." The creation of the AFB corporations was only for the convenience of the United States to enable it to finance military construction in a manner determined by the Congress to be most conducive to the national interest. . . . ' "

The limited function of the Delaware corporation, its power and purpose are aptly stated by the Michigan court in *Knapp-Stiles, Inc., v. Michigan Department of Revenue*, CCH 2 Mich. Tax Cases ¶ 200-202 (1962). There, as here, the contracts were for military housing under the Capehart Act. The court said relative to the corporations:

" . . . In the Invitation for Bids, which is prepared and issued by the United States, acting through the Department of the Air Force, there is found in Paragraph 1, above quoted, the following:

" 'The statute further contemplates that the Government-owned housing site be leased to a mortgagor or borrower corporation *which will act as a channel* for the proceeds of the mortgage loan from the lender to the successful bidder . . . '

"And a review of the documents—the lease, the contract, and the mortgage is convincing that this is sub-

tantially the only function that the Delaware corporation do perform.

"They have no real powers except to do the bidding of the United States. . . .

" . . .

"The corporations do not determine the terms of the contract. That is all done before the corporations come into existence. They do not determine whether the contract has been performed. They cannot modify its terms. They cannot terminate it.

"True, the corporations had a lease upon the premises. While this is nominally for a fifty-five year term, in fact, the actual possession, maintenance and operation of the housing is in the hands of the United States and its Air Force as soon as the housing is ready for occupancy.

"The United States alone determines the terms of the contract. It alone can modify or terminate it. It alone determines when it has been performed."

An analysis of *In re S. S. Silberblatt, Inc., v. Tax Comm. of the State of New York*, 5 N.Y.(2d) 635, 159 N.E.(2d) 195, 186 N.Y.S.(2d) 646 (1959), cited by the majority, discloses that the opinion is based on the erroneous premise that the Delaware corporations were " . . . created for a commercial purpose for private profit, as distinguished from a governmental purpose." As heretofore stated, consideration of the housing contract in its entirety cannot support such a conclusion. The analysis of the housing contract and the reasoning of the dissent in the *Silberblatt* case is correct.

"... Although under our State law the tax is imposed upon the recording of the mortgage (*Franklin Soc. v. Bennett*, 282 N.Y. 79), this case is controlled by Federal law under which the tax is on the mortgage itself, which is a Federal instrumentality exempt from State taxation (*Federal Land Bank v. Crosland*, 261 U.S. 374; ...). Unlike the Wherry Act, the Capehart Act, under which this military housing project was authorized, renders petitioner-appellant merely a builder and not a private sponsor of the military housing. The United States, through its Department of Defense, is the sponsor, financier and owner of the entire project. The mortgagor corporations are mere fictions, and they and the mortgagee banks had no other function in this business than to act as agents for the Federal Government (*Clallam County v. United States*, 263 U.S. 341, 345, 44 S.Ct. 121, 68 L.Ed. 328; *Railroad Co. v. Peniston*, 18 Wall 5, 42, 85 U.S. 5, 42, 21 L.Ed. 787) ..."

The majority attempt to distinguish the *Clallam County* case on the basis that the corporation there had no purpose other than to produce war materials for the United States government, and it quotes from the *Clallam County* case as follows:

"... This is not like the case of a corporation having its own purposes as well as those of the United States...."

The inference from this quotation which is desired by the majority is that the Delaware corporation had purposes other than those of the United States government. This is erroneous and unsupported by the record.

The holding of the cases cited by the majority, ***E. I. Du Pont de Nemours & Co. v. State***, 44 Wn.(2d) 339, 267 P.(2d) 667 (1954), and *United States v. Brown*, 41 F.Supp. 838 (1941), is not inconsistent with the *Clallam County* case since the corporations, in those cases, were not instrumentalities of the United States because they had separate commercial purposes for private profit.

In the instant case we should hold that, although the mortgagor-builder is the "buyer" to whom the retail sale of the housing project construction was made, it was nothing more than an instrumentality of the United States government; that it had no commercial purpose other than for the convenience of the United States, serving as a means to the end of obtaining this military housing; and that the sovereign immunity of the federal government applies.

The judgment of the trial court should be reversed, and the cause remanded with instructions to enter judgment restraining the Tax Commission from imposing the tax and to permit recovery of the tax which appellants paid under protest.

HILL, DONWORTH, and WEAVER, JJ., concur with HUNTER, J.

APPENDIX B

STATUTES INVOLVED

Revised Code of Washington

RCW 82.08.010 Definitions. For the purposes of this chapter:

(1) "Selling price" means the consideration, whether money, credits, rights, or other property, expressed in the terms of money paid or delivered by a buyer to a seller, all without any deduction on account of the cost of tangible property sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes, or any other expenses whatsoever paid or accrued and without any deduction on account of losses; but shall not include the amount of cash discount actually taken by a buyer;

(2) "Seller" means every person making sales at retail or retail sales to a buyer or consumer, whether as agent, broker, or principal;

(3) "Buyer" and "consumer" include, without limiting the scope hereof, every individual, receiver, assignee, trustee in bankruptcy, trust, estate, firm, copartnership, joint venture, club, company, joint stock company, business trust, corporation, association, society, or any group of individuals acting as a unit, whether mutual, cooperative, fraternal, nonprofit, or otherwise, municipal corporation, quasi municipal corporation, and also the state, its departments and institutions and all political subdivisions thereof, irrespective of the nature of the activities engaged in or

functions performed, and also the United States or any instrumentality thereof;

(4) The meaning attributed in chapter 82.04 to the terms "tax year," "taxable year," "person," "company," "sale," "sale at retail," "retail sale," "sale at wholesale," "wholesale sale," "business," "engaging in business," "cash discount," "successor," "consumer," "in this state" and "within this state" shall apply equally to the provisions of this chapter. . . .

RCW 82.08.020 Retail sales tax imposed. There is levied and there shall be collected a tax on each retail sale in this state equal to three and one-thfrd per cent of the selling price: *Provided*, That from April 1, 1959 the tax imposed by this section shall be equal to four per cent of the selling price. The tax imposed under this chapter shall apply to successive retail sales of the same property and to the retail sale of intoxicating liquor by the Washington state liquor stores. . . .

RCW 82.08.030 Exemptions. The tax hereby levied shall not apply to the following sales:

(1) Casual and isolated sales of property or service, unless made by a person who is engaged in a business activity taxable under chapters 82.04., 82 16 or 82.28: *Provided*, That the exemption provided by this paragraph shall not be construed as providing any exemptio nfrom the tax imposed by chapter 82.12;

(2) Sales made by persons in the course of business activities with respect to which tax liability is specifically imposed under chapter 82.16, when the gross proceeds from such sales must be included in the measure of the tax imposed under said chapter;

(3) The distribution and newsstand sales of newspapers;

(4) Sales which the state is prohibited from taxing under the Constitution of this state or the Constitution or laws of the United States;

(5) Sales of motor vehicle fuel used in aircraft by the manufacturer thereof for research, development, and testing purposes and sales of motor vehicle fuel taxable under chapter 82.36: *Provided,* That the use of any such fuel upon which a refund of the motor vehicle fuel tax has been obtained shall be subject to the tax imposed by chapter 82.12;

(6) Sales (including transfers of title through decree of appropriation) heretofer or hereafter made of the entire operating property of a publicly or privately owned public utility, or of a complete operating integral section thereof, to the state or a political subdivision thereof for use in conducting any business defined in subdivisions (1), (2), (3), (4), (5), (6), (7), (8), (9), (10) or (11) of RCW 82.16.010;

(7) Auction sales made by or through auctioneers of tangible personal property (including household goods) which have been used in conducting a farm activity, when the seller thereof is a farmer and the sale is held or conducted upon a farm and not otherwise;

(8) Sales to corporations which have been incorporated under any act of the congress of the United States and whose principal purposes are to furnish volunteer aid to members of armed forces of the United States and also to carry on a system of national and international relief and to apply the same in mitigat-

ing the sufferings caused by pestilence, famine, fire, floods, and other national calamities and to devise and carry on measures for preventing the same;

(9) Sales of purebred livestock for breeding purposes where the animals are registered in a nationally recognized breed association; sales of cattle and milk cows used on the farm;

(10) Sales of tangible personal property (other than the type referred to in subdivision (11) hereof) for use by the purchaser in connection with the business of operating as a private or common carrier by air, rail, or water in interstate or foreign commerce: *Provided*, That any actual use of such property in this state shall, at the time of such actual use, be subject to the tax imposed by chapter 82.12;

(11) Sales of airplanes, locomotives, railroad cars, or watercraft for use in conducting interstate or foreign commerce by transporting therein or therewith property and persons for hire or for use in conducting commercial deep sea fishing operations outside the territorial waters of the state; also sales of tangible personal property which becomes a component part of such airplanes, locomotives, railroad cars, or watercraft, and of motor vehicles or trailers used by the holder of a carrier permit issued by the Interstate Commerce Commission authorizing transportation by motor vehicle across the boundaries of this state, in the course of constructing, repairing, cleaning, altering, or improving the same; also sales of or charges made for labor and services rendered in respect to such constructing, repairing, cleaning, altering, or improving;

(12) Sales of motor vehicles and trailers to be used for the purpose of transporting therein persons or property for hire in interstate or foreign commerce: *Provided*, That the purchaser must be the holder of a carrier permit issued by the Interstate Commerce Commission and that the vehicles will first move upon the highways of this state from the point of delivery in this state to a point outside of this state under the authority of a one-transit permit issued by the director of licenses pursuant to the provisions of RCW 46.16.100;

(13) Sales of motor vehicles and trailers to nonresidents of this state for use outside of this state, even though delivery be made within this state, but only when (a) the vehicles or trailers will be taken from the point of delivery in this state directly to a point outside this state under the authority of a one-transit permit issued by the director of licenses pursuant to the provisions of RCW 46.16.100, or (b) said motor vehicles and trailers will be registered and licensed immediately under the laws of the state of the purchaser's residence, will not be used in this state more than three months, and will not be required to be registered and licensed under the laws of this state.

(14) Sales to nonresidents of this state for use outside of this state of tangible personal property which becomes a component part of any machinery or other article of personal property belonging to such nonresident, in the course of installing, repairing, cleaning, altering, or improving the same and also sales of or charges made for labor and services rendered in respect to any installing, repairing, cleaning, altering, or

improving, of personal property of or for a nonresident, but this subsection (14) shall apply only when the seller agrees to, and does, deliver the property to the purchaser at a point outside this state, or delivers the property to a common or bona fide private carrier consigned to the purchaser at a point outside this state;

(15) Sales to nonresidents of this state for use outside of this state of watercraft requiring coast guard registration or registration by the state of principal use according to the Federal Boating Act of 1958, even though delivery be made within this state, but only when (a) the watercraft will not be used within this state for more than forty-five days and (b) an appropriate exemption certificate supported by identification ascertaining residence as provided by the tax commission and signed by the purchaser or his agent establishing the fact that the purchaser is a non-resident and that the watercraft is for use outside of this state, one copy to be filed with the tax commission with the regular report and a duplicate to be retained by the dealer.

(16) Sales of baby chicks and turkey poults for use in the production for sale of poultry or poultry products.

(17) Sales to nonresidents of this state for use outside of this state of machinery and implements for use in conducting a farming activity, when such machinery and implements will be transported immediately outside the state. As proof of exemption, an affidavit or certification in such form as the tax commission shall require shall be made for each such sale, to be retained as a business record of the seller.

(18) Sales for use in noncontiguous states, territories and possessions of the United States, but only when, as a necessary incident to the contract of sale, the seller delivers the subject matter of the sale to the purchaser or his designated agent at the usual receiving terminal of the carrier selected to transport the goods, under such circumstances that it is reasonably certain that the goods will be transported directly to a destination in such noncontiguous states, territories and possessions. . . .

* * *

RCW 82.08.050 Buyer to pay, seller to collect tax—Penalties. The tax hereby imposed shall be paid by the buyer to the seller, and each seller shall collect from the buyer the full amount of the tax payable in respect to each taxable sale in accordance with the schedule of collections adopted by the tax commission pursuant to the provisions of RCW 82.08.060. The tax required by this chapter, to be collected by the seller, shall be deemed to be held in trust by the seller until paid to the commission, and any seller who appropriates or converts the tax collected to his own use or to any use other than the payment of the tax to the extent that the money required to be collected is not available for payment on the due date as prescribed in this chapter shall be guilty of a misdemeanor.

In case any seller fails to collect the tax herein imposed or having collected the tax, fails to pay it to the commission in the manner prescribed by this chapter, whether such failure is the result of his own acts or the result of acts or conditions beyond his control, he

shall, nevertheless, be personally liable to the state for the amount of the tax.

The amount of tax, until paid by the buyer to the seller, or to the commission, shall constitute a debt from the buyer to the seller and any seller who fails or refuses to collect the tax as required with intent to violate the provisions of this chapter or to gain some advantage or benefit, either direct or indirect, and any buyer who refuses to pay any tax due under this chapter shall be guilty of a misdemeanor.

Where a buyer has failed to pay to the seller the tax imposed by this chapter and the seller has not paid the amount of the tax to the commission, the commission may, in its discretion, proceed directly against the buyer for collection of the tax, in which case a penalty of ten percent may be added to the amount of the tax for failure of the buyer to pay the same to the seller, regardless of when the tax may be collected by the commission; and all of the provisions of chapter 82.32, including those relative to interest and penalties, shall apply in addition; and, for the sole purpose of applying the various provisions of chapter 82.32, the fifteenth day of the month following the bimonthly tax period in which the purchase was made shall be considered as the due date of the tax. . . .

RCW 82.08.060 Collection of tax — Methods and schedules. The tax commission shall have power to adopt rules and regulations prescribing methods and schedules for the collection of the tax required to be collected by the seller from the buyer under this chapter. The methods and schedules prescribed shall be

adopted so as to eliminate the collection of fractions of one cent and so as to provide that the aggregate collections of all taxes by the seller shall, insofar as practicable, equal the amount of tax imposed by this chapter. Such schedules may provide that no tax need by collected from the buyer upon sales below a stated sum and may be amended from time to time to accomplish the purposes set forth herein. . . .

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RCW 82.08.140 Administration. The provisions of RCW 82.04.470 and all of the provisions of chapter 82.32 shall have full force and application with respect to taxes imposed under the provisions of this chapter. . . .

"SALE DEFINED

RCW 82.04.040 "Sale" means any transfer of the ownership of, title to, or possession of property for a valuable consideration and includes any activity classified as a "sale at retail" or "retail sale" under RCW 82.04.050. It includes renting or leasing, conditional sale contracts, leases with option to purchase, and any contract under which possession of the property is given to the purchaser but title is retained by the vendor as security for the payment of the purchase price. It also includes the furnishing of food, drink, or meals for compensation whether consumed upon the premises or not.

"Casual or isolated sale" means a sale made by a person who is not engaged in the business of selling the type of property involved.

"SALE AT RETAIL," "RETAIL SALE" DEFINED

RCW 82.04.050 "Sale at retail" or "retail sale" means every sale of tangible personal property (including articles produced, fabricated, or imprinted) other than a sale to one who (a) purchases for the purpose of resale as tangible personal property in the regular course of business, or (8) installs, repairs, cleans, alters, imprints, improves, constructs, or decorates real or personal property of or for consumers, if such tangible personal property becomes an ingredient or component of such real or personal property, or (c) purchases for the purpose of consuming the property purchased in producing for sale a new article of tangible personal property or substance, of which such property becomes an ingredient or component or as a chemical used in processing, when the primary purpose of such chemical is to create a chemical reaction directly through contact with an ingredient of a new article being produced for sale. The term also means every sale of tangible personal property to persons engaged in any business which is taxable under RCW 82.04.280, subsection (2), and 82.04.290.

The term "sale at retail" or "retail sale" shall include the sale or charge made for tangible personal property consumed and/or for labor and services rendered in respect to the following: (a) The installing, repairing, cleaning, altering, imprinting, or improving of tangible personal property of or for consumers, excluding, however, services rendered in respect to live animals, birds and insects; (b) the constructing, repairing, decorating, or improving of new or existing buildings or other structures under, upon, or above

real property of or for consumers, including the installing or attaching of any article of tangible personal property therein or thereto, whether or not such personal property becomes a part of the realty by virtue of installation, and shall also include the sale of services or charges made for tue clearing of land and the moving of earth, excepting the mere leveling of land used in commercial farming or agriculture; (c) the sale of or charge made for labor and services rendered in respect to the cleaning, fumigating, razing or moving of existing buildings or structures, but shall not include the charge made for janitorial services; (d) the sale of or charge made for labor and services rendered in respect to automobile towing, armored car service and similar automotive transportation services, but not in respect to those required to report and pay taxes under chapter 82.16; (e) the sale of and charge made for the furnishing of lodging and all other services by a hotel, rooming house, tourist court, motel, trailer camp, and the granting of any similar license to use real property, as distinguished from the renting or leasing of real property, and it shall be presumed that the occupancy of real property for a continuous period of one month or more constitutes a rental or lease of real property and not a mere license to use or enjoy the same.

The term shall not include the sale of or charge made for labor and services rendered in respect to the building, repairing, or improving of any publicly owned street, place, road, highway, bridge, or trestle which is used for to be used primarily for foot or vehicular traffic, nor shall it include sales of feed, seed, fertilizer,

and spray materials to persons for the purposes of producing for sale any agricultural product whatsoever, including milk, eggs, wool, fur, meat, honey, or other substances obtained from animals, birds, or insects.

"SALE AT WHOLESALE," "WHOLESALE SALE" DEFINED

RCW 82.04.060 "Sale at wholesale" or "wholesale" sale" means any sale of tangible personal property which is not a sale at retail and means any charge made for labor and services rendered for persons who are not consumers, in respect to real or personal property, if such charge is expressly defined as a retail sale by RCW 82.04.050 when rendered to or for consumers: *Provided,* That the the term "real or personal property" as used in this section shall not include any natural products named in RCW 82.04.100.

"GROSS PROCEEDS OF SALES" DEFINED

RCW 82.04.070 "Gross proceeds of sales" means the value proceeding or accruing from the sale of tangible personal property and/or for services rendered, without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest, discount paid, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses.

"CONSUMER" DEFINED

RCW 82.04.190 "Consumer" means the following:

(1) Any person who purchases, acquires, owns, holds, or uses any article of tangible personal property other than for the purpose (a) of resale as tangible

personal property in the regular course of business or (b) of incorporating such property as an ingredient or component of real or personal property when installing, repairing, cleaning, altering, imprinting, improving, constructing, or decorating such real or personal property of or for consumers or (c) of consuming such property in producing for sale a new article of tangible personal property or a new substance, of which such property becomes an ingredient or component or as a chemical used in processing, when the primary purpose of such chemical is to create a chemical reaction directly through contact with an ingredient of a new article being produced for sale;

(2) Any person engaged in any business activity taxable under RCW 82.04.290;

(3) Any person engaged in the business of contracting for the building, repairing or improving of any publicly owned street, place, road, highway, bridge or trestle which is used or to be used primarily for foot or vehicular traffic as defined in RCW 82.04.280, in respect, however, only to tangible personal property used or consumed in such business;

(4) Any person who is an owner, lessee or has the right of possession to or an easement in real or personal property which is being constructed, repaired, improved, cleaned, imprinted, or otherwise altered by a person engaged in business, excluding only the United States, the state, and its political subdivisions in respect to labor and services rendered to their real property which is used or held for public road purposes.